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Office of Administrative Law Judges
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Issue Date: 06 January 2005

CASE NO: 2004-LHC-00905

OWCP NO: 15-42243

In the Matter of

JUNE WALROTH,
Complainant

v.

ARMY AND AIR FORCE EXCHANGE SERVICE,
Permissibly Self-Insured Employer, and

CONTRACT CLAIMS SERVICES, INC.,
Third Party Administrator.

Appearances: June Walroth,
In Proper Person

William N. Brooks, II, Esq.
For the Employer and Carrier

Before: Russell D. Pulver
Administrative Law Judge

DECISION AND ORDER DENYING BENEFITS

BACKGROUND

This case arises from a claim for compensation brought under the Longshore and Harbor Worker's Compensation Act, as amended, 33 U.S.C. § 901 ("the Act") as extended pursuant to the Non-appropriated Fund Instrumentalities Act, 5 U.S.C. §8171, *et seq*. The Act provides compensation to certain employees (or their survivors) engaged in employment with Non-Appropriated Funds entities for occupational diseases or unintentional work-related injuries, irrespective of fault, resulting in disability or death. June Walroth ("Claimant") brought this claim against the Army and Air Force Exchange Service ("Respondent"), alleging that she sustained an injury to her back and neck while employed by Respondent, which gave rise to cervical, upper back, left-upper extremity, and carpal tunnel injuries, as well as fibromyalgia.

Respondent concedes that Claimant suffered an industrial injury on August 28, 1997, but counters that Claimant received appropriate treatment and recovered from this injury by 1998, and at that point was fully capable of performing her usual and customary job duties.

The Director, Office of Worker's Compensation Programs (OWCP), referred this case to the Office of Administrative Law Judges (OALJ) for a hearing. The case was assigned to the undersigned and a formal hearing was held before the undersigned on September 14, 2004, in Honolulu, Hawaii, at which time all parties were afforded a full and fair opportunity to present evidence and arguments. The undersigned explained to Claimant her right to representation by an attorney of her choice. Claimant knowingly waived her right to counsel and insisted on proceeding with the hearing in the absence of legal representation. Administrative Law Judge Exhibits ("AX") 1-4, Claimant's Exhibits ("CX") 1-18, and Respondent's Exhibits ("RX") 1-26 were admitted into the record. Claimant, Dr. Shepard Ginandes, Dr. John Henrickson, Jr., Roy Kupihea, Dr. Boyd Slomoff, and Tammy Moseley testified at the hearing.

The findings and conclusions which follow are based on a complete review of the record in light of the arguments of the parties, applicable statutory provisions, regulations, and pertinent precedent.

STIPULATIONS

The parties stipulate and I find:

1) The parties are subject to coverage under the Act;
2) An employer/employee relationship exists;
3) Claimant suffered an industrial injury under the Act on August 28, 1997;
4) Notice, claim and controversion have been timely; and
5) Claimant's average weekly wage was $222.31 and her compensation rate is $200.27.

ISSUE

The issue remaining to be resolved is:

1) The nature and extent of Claimant's disability concerning whether Claimant's initial industrial injury caused subsequent orthopedic injuries, fibromyalgia, or a somatoform pain disorder.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

I. Statement of the Case

In 1997, Claimant began working for Respondent as a food service worker. Hearing Transcript ("TR") at 73. On August 28, 1997, Claimant felt a pop in her back and a strain in her neck while lifting overhead a bucket of water to clean a yogurt machine. TR at 76-77; RX 1.

She reported this incident to Respondent, but did not seek medical treatment until approximately 10 days later when she awoke in pain. TR at 83, RX 3. Following this injury, Claimant continued to work for Respondent as a food service employee. RX 1, 4.

In September 1998, Claimant applied for and received an accounting associate position with Respondent. TR at 163-64. She remained in this position until September 2000, at which time she claims she was in too much pain to continue. RX 20 at 11. Respondent contends that Claimant was motivated to quit due to conflicts with co-workers and to Claimant's belief that her co-workers were "sabotaging her work." TR at 171; RX 20 at 68. Since leaving this position in September 2000, Claimant neither has neither worked nor sought additional employment. TR at 185-186.

Claimant received temporary total disability compensation for her August 28, 1998 injury from September 6, 1997 through November 28, 1997, and from April 6, 1998 through April 25, 1998.[1] RX 5. Claimant also received temporary partial disability compensation from September 6, 1997 through November 28, 1997. *Id*.

On December 2, 2000, Claimant filed this subject claim for compensation, alleging cervical, upper back, left-upper extremity, fibromyalgia, and carpal tunnel injuries. RX 2. Claimant argues that she is entitled to compensation for these additional maladies because they were caused by her August 28, 1997 injury. Respondent contends that these subsequent injuries are unrelated to the initial industrial injury, and therefore not compensable.

II. Summary of Evidence

Preliminary Reports of Injury

On September 10, 1997, Claimant went to the Kapiolani Medical Center and saw Dr. Lee, who diagnosed a neck strain.[2] RX 7. On October 3, 1997, Claimant saw Dr. Pierce, a neurologist, who found significant muscle spasm in her neck. CX 1. On November 12, 1997, Dr. Sasaki at Kaiser examined Claimant and diagnosed a cervical and trapezius sprain and myofascial pain syndrome. RX 9. Dr. Sasaki noted that Claimant's subjective complaints were out of proportion to objective findings. *Id*. On December 19, 1997, Claimant underwent an MRI that found nothing remarkable. RX 8. On January 29, 1998, Dr. Sasaki gave an assessment of chronic cervical thoracic and trapezius myofascial pain and carpal tunnel syndrome. CX 2.

[1] On October 31, 1997, Employer controverted Claimant's right to compensation payments. RX 4. Employer currently disputes the amount of compensation paid for the August 28, 1997 injury, claiming that Claimant has been overpaid. The issue of overpayment is not discussed in this Decision and Order.

[2] From September 19, 1997 to October 3, 1997, Claimant underwent physical therapy. CX 1. At Claimant's last visit, she stated that she had decreased pain and an overall improvement in functional activities. CX 1.

Dr. Oki

In 1998, Claimant saw Dr. Oki, a rheumatologist. RX 11. The record is unclear as to the precise dates and the numbers of visits.[3] By letter dated April 28, 1999, Dr. Oki concluded that Claimant was medically stable as to her carpal tunnel syndrome and as to her myofascial pain. RX 11, CX 4. Substantive findings by Dr. Oki are not provided in the record by his medical reports, however they are referenced in reports written by Dr. Henrickson and Dr. Slomoff, which are discussed below. *See* RX 6; RX 15.

Dr. Rinzler

Following Claimant's treatment with Dr. Oki, she began treatment with Dr. Rinzler, a chronic pain specialist. RX 12. This doctor-patient relationship ended abruptly after a phone conversation in which Dr. Rinzler felt Claimant was "fairly abusive and demanding." *Id*. Upon concluding that he would no longer provide services to Claimant, Dr. Rinzler offered the following opinion: "much of the problem revolves around her unwillingness to acknowledge the psychological contributions to her pain and distress, and her subsequent need to be 'cured' by external means." *Id*.

Dr. Crowley

By reference from Dr. Oki, Claimant saw Dr. Crowley, a physiatrist. RX 10, CX 3. Claimant complained of numbness that extended down her left-upper extremity. RX 10. Upon examination, Dr. Crowley found no physiologic abnormalities. *Id*. He recorded, however, that Claimant reported hypoesthesia "over the top of her shoulder and deltoid and in much of her left hand." *Id*. After Claimant underwent an electodiagnostic examination, Dr. Crowley gave the impression that there were neither findings of radiculopathy, plexopathy or nerve entrapment, nor findings of peripheral neuropathy. *Id.* In a letter dated August 23, 1999, Dr. Crowley opined that Claimant presents somatoform pain syndrome. CX 3.

Dr. Arakawa

Claimant's first visit with Dr. Arakawa, a rheumatologist, was on June 16, 2000. CX7. In his subsequent report, Dr. Arakawa found that Claimant had "mild diffuse fibromyalgia tender points." *Id*. Dr. Arakawa's notes show no change in Claimant's clinical status from the date of her first visit through May 23, 2001. RX 14, CX 7. Dr. Arakawa gave the impression that as of January 12, 2001, Claimant reached her maximal medical improvement.[4] RX 14.

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[3] According to the testimony of Dr. Henrickson, Dr. Oki began treating Claimant on March 10, 1998, at which time he diagnosed a muscle tear resulting from Claimant's industrial injury. TR at 108. Dr. Henrickson also testified that on September 28, 1998, Dr. Oki intended to close Claimant's case following an exam that showed Claimant's condition was normal. TR at 108. Notably, Dr. Henrickson relied upon Dr. Oki's medical reports that are not part of the record.

[4] In a report written by Dr. Slomoff, he records that Dr. Arawaka found on September 15, 2000, that Claimant's symptoms were due to a "complex interplay of fibromyalgia, chronic fatigue syndrome, and depression." RX 15 at 93.

In a letter dated June 19, 2001, Dr. Arakawa explained that he watched surveillance videos taken of Claimant, and he found "the movements that she displayed on the video are not consistent with her complaints of severe pain and claims of disability." RX 14. He also opined that "she always seems to relate work and the stresses involved in causing her to feel worse." *Id*. He further concluded that she should be able to return to work, provided that she would be excused from heavy work. *Id*.

Dr. Ginandes

Dr. Ginandes, a psychiatrist, testified that he began seeing Claimant sometime in 1997 or 1998. TR at 34. Respondent later corrected him, however, and Dr. Ginandes admitted that Claimant first came under his care on October 6, 2000. TR at 48. From October 6, 2000, to the time of the hearing, Claimant consistently received cognitive and behavioral psychotherapy from this doctor. TR at 39. Initially, he diagnosed Claimant with having an adjustment disorder with anxiety, severe depressed mood, and a pain disorder. TR at 38-39. Over the course of her treatment, Dr. Ginandes found that Claimant developed major depression. TR at 39. At the hearing, Dr. Ginandes testified that her current diagnosis consists of major depression in partial remission, fibromyalgia, and pain disorder. TR at 46. In a letter to Claimant's former attorney, Dr. Ginandes concluded that all of these diagnoses are related to Claimant's work. CX 8.

Dr. Ginandes had difficulty recalling the details of Claimant's treatment history. TR at 49. Notably, he was uncertain of Claimant's past and present drug treatment. TR at 41-45. He asserted that Claimant tried Xanax and Klonopin, but that they were ineffective and quickly discontinued. TR at 41. Claimant contradicted this by reminding him that she continued to take Xanax, Klonopin, and Restoril. TR at 42. When questioned whether he had prescribed medicinal marijuana for Claimant, he could not recall; yet Claimant interjected that he had. TR at 54.

Dr. Ginandes admitted that he is not an expert in fibromyalgia. TR at 49. He explained that the cause of fibromyalgia is unknown, but nonetheless opined that the condition often follows a traumatic injury. TR at 58. He conceded that stress can add to fibromyalgia, and that Claimant experienced stress such as the passing of her mother, abuse by her ex-husband, her divorce, altercations with her roommates, and conflicts with her boyfriend and with her former attorney, which were unrelated to her industrial injury but relevant to an evaluation of her psychiatric level of functioning. TR at 52, 53. Nonetheless, he asserted that no one has proven that stress alone leads to fibromyalgia. TR at 59.

Dr. Henrickson

On January 6, 1998, Claimant was examined by Dr. Henrickson, a neurosurgeon for an IME. TR at 98; RX 6 at 24.[5] She complained that her body "hurts all over" and that she had trouble sleeping. *Id*. at 27. Based on a physical examination, Dr. Henrickson found swelling in Claimant's left scalene muscles and that she had a "very active trigger point in the left medial trapezius." *Id.* at 28. He also found active trigger points in the "left rhomboids, trapezius, and

[5] In a letter dated March 16, 1998, Dr. Sasaki explained that he had reviewed Dr. Hendrickson's report and that he is in agreement with his evaluation and recommendations. RX 9.

levator scapula, and the left scalene muscles are markedly tender and in spasm." *Id.*; TR at 104. Dr. Henrickson gave an impression of a muscle tear in the left trapezius or rhomboid muscle, and he found that her symptoms were consistent with the physical examination. RX 6 at 29. In conclusion, Dr. Henrickson recommended that Claimant return to work with a lifting restriction of 10 pounds, no overhead lifting, and avoidance of cold environments. *Id.* at 30; TR at 106.

On October 14, 1999, Claimant returned to Dr. Henrickson. RX 6 at 31. Claimant complained of various maladies including gastrointestinal, bowel, and brain complaints; dizziness; fatigue; food intolerances; and nervousness. *Id*. Dr. Henrickson opined that these complaints went "well beyond" a regional myofascial pain syndrome. TR at 107. He concluded that Claimant's industrial injury had resolved, and that she suffered from generalized, chronic fibromyalgia that was unrelated to the industrial injury. RX 6 at 35.

In his October 14, 1999 report, Dr. Henrickson made reference to Dr. Oki, Dr. Rinzler, and Dr. Crowley. *Id.* at 32-34. He relayed Dr. Oki's findings that by September 28, 1998, Claimant's left shoulder was "essentially normal." *Id*, at 32; TR at 108. As to Dr. Rinzler's treatment, Dr. Henrickson concluded that Claimant's industrial injury had healed by the time she saw Dr. Rinzler; instead of treatment for the industrial injury, she received treatment for a "generalized systemic condition." RX 6 at 33. As to Dr. Crowley's treatment, Dr. Henrickson noted that Dr. Crowley independently concluded that Claimant's initial condition resulting from the August 28, 1997, had healed by September 1999. *Id*. at 34. Dr. Henrickson agreed with Dr. Crowley's finding of a somatoform pain disorder, and he opined that the somatoform symptoms were not related to the industrial injury. TR at 110.

In a report dated November 3, 1999, Dr. Henrickson summarized Claimant's treatment from the date of the injury. RX 6 at 38. He noted that by June 16, 1998, based upon records provided by Dr. Oki, Claimant required no further treatment and that any treatment beyond that date was unrelated to the subject injury. *Id*. at 39. He asserted, "Doctors Crowley and Oki are both of the opinion that Ms. Walroth's symptoms are primarily the result of psychological and emotional problems. I would agree with this assessment." *Id*. He reiterated that he agreed with Dr. Crowley's findings of a somatoform disorder, but that such disorder was unrelated to the August 28, 1997 injury. *Id*. at 41.

Claimant returned to Dr. Henrickson on May 29, 2001. *Id*. at 42. Claimant complained of pain over most of her body. *Id*.. Dr. Hendrickson found that Claimant's pain was associated with stress, and that she had a "normal clinical examination." *Id*. at 46. He concluded that she may have serious psychological problems, which were not related to her industrial injury. *Id*. Finally, he found no physical reason to preclude Claimant from returning to work. *Id*.

Like Dr. Arakawa, Dr. Henrickson viewed the surveillance videos of Claimant. *Id*. at 47. In a letter dated July 17, 2001, he opined that the videos showed her to be functioning normally, thereby rendering her complaints inconsistent with her activities. *Id*. Consequently, he changed his diagnosis to a primary condition of symptom magnification due to a somatoform pain disorder and functional overlay. *Id*. Again, Dr. Henrickson concluded that Claimant had reached a point of maximum medical improvement. *Id*.

During Claimant's final visit with Dr. Henrickson, on September 18, 2003, Dr. Henrickson noted that she was difficult to examine because she would fall to the side and state that she was going to faint. *Id*. at 53. Dr. Henrickson accomplished a full examination of her musculoskeletal symptoms nonetheless; sought trigger points in her neck, back, and extremities; and tested her range of motion, reflexes, and equilibrium. *Id*. at 53-54. He concluded, "the patient is again found to have a normal clinical examination with no objective findings consistent with residuals from the subject injury of August 28, 1997." *Id.*

Dr. Slomoff

On August 2, 2002, Claimant was evaluated by Dr. Slomoff, a psychiatrist. TR at 268, RX 15 at 87. In his subsequent report, Dr. Slomoff gave the impression of a somatoform disorder and he explained that Claimant's current psychiatric condition is not resulting from the August 28, 1997 injury, but rather the interplay of many different factors. RX 15 at 27. These factors – deemed "stressors" – include developmental trauma; personality traits; multiple relationship difficulties; periodic injuries and abuse; and occupational problems. RX 15 at 29-30. During the hearing, Dr. Slomoff testified that "it was the panoply of stressors of life and current associated events that affected [Claimant]." TR at 277. Although Dr. Slomoff conceded that the industrial injury was one of the many stressors in Claimant's life, it was not "etiologic for her primary psycho-pathology." RX 15 at 117. He asserted that she recovered from the industrial injury, and if that injury had never happened, then she would have the same condition that she has currently. TR at 290, 303.

Dr. Slomoff evaluated Claimant a second time on September 25, 2003. RX 15 at 120. His subsequent report reiterates that Claimant's somatoform disorder is a result of a pre-existing condition. *Id*. In both of his reports and during testimony, Dr. Slomoff spoke of Claimant's treatment with Dr. Ginandes as one of "clinical continuity" or "passive-dependence," which is not necessarily in Claimant's best interest. RX 15 at 119, 133; TR at 282. He opined that this type of treatment encourages Claimant to focus on the condition itself, rather than on moving forward with her life. RX 15 at 115; TR at 286. Finally, Dr. Slomoff concluded that Claimant's date of maximum medical improvement was July 17, 2001. RX 15 at 119. He explained that this date "allows for inclusion of the psychological perspective, as well." RX 15 at 119.

Tammy Mosely

Claimant's daughter, Tammy Mosely, also testified at the hearing. TR at 310-317. She explained that Claimant lived with her during the onset of Claimant's injuries. TR at 312. Ms. Mosely does not have a medical background, yet she observed that Claimant went from being active to "pretty much being laid up in pain and having a hard time . . . since her injury with her neck." *Id*.

Surveillance Videos

Surveillance videos of Claimant were taken on March 5-6, 2001; March 28, and 31, 2001; April 1-3 2001; May 24, 28, and 29, 2001; and September 3-5, 2003. RX 19; TR at 230. Claimant contends that the videos are edited such that their authenticity is suspect. Respondent

countered this contention with the testimony of the investigator who took the video, Roy Kupihea. TR at 226-228. Upon review of the videos, I find that they contain coverage of claimant visiting with family and playing with her grandchildren on the beach; walking her dog; doing mild chores; driving; talking on the phone; and eating a meal. RX 19. The videos show Claimant's rather sedentary lifestyle, but no obvious distress or lack of function.

III. Discussion of the Law and Facts

Credibility of Witnesses

This Administrative Law Judge, in arriving at a decision in this matter, is entitled to determine the credibility of the witnesses, to weigh the evidence, and to draw on his own inferences from it, and he is not bound to accept the opinion or theory of any particular medical examiner. *Banks v. Chicago Grain Trimmers Assoc., Inc*., 390 U.S. 459 (1968), *reh. denied*, 391 U.S. 929 (1969); *Todd Shipyards v. Donovan*, 300 F. 2d 741 (5th Cir. 1962); *Scott v. Tug Mate, Inc.*, 22 BRBS 164, 165-167 (1989); *Anderson v. Todd Shipyard Corp*., 22 BRBS 20, 22 (1989). At the outset it further must be recognized that all factual doubts must be resolved in favor of the claimant. *Wheatly v. Adler*, 407 F.2d 307 (D.C. Cir. 1968); *Stracham Shipping Co. v. Shea*, 406 F.2d 521 (5th Cir. 1969); *cert. denied*, 395 U.S. 921 (1970). Furthermore, it consistently has been held that the Act must be construed liberally in favor of the claimant. *Voris v. Eikel*, 346 U.S. 328 (1953); *J.V. Vozzolo, Inc. v. Britton*, 377 F.2d 144 (D.C. Cir. 1967). Based upon the humanitarian nature of the Act, claimants are to be accorded the benefit of all doubts. *Durrah v. WMATA*, 760 F.2d 320 (D.C. Cir. 1985); *Champion v. S&M Traylor Brothers*, 690 F.2d 285 (D.C. Cir. 1982); *Harrison v. Potomac Electric Power Company*, 8 BRBS 313 (1978).

Generally, the opinions of a treating physician are afforded greater weight because the treating physician "is employed to cure and has a greater opportunity to know and observe the patient as an individual." *Amos v. Director, OWCP*, 153 F.3d 1051, 32 BRBS 144, 147 (CRT)(9th Cir. 1998). Nonetheless, an ALJ may reject the treating physician's opinion, whether or not that opinion is contradicted. *Rodriguez v. Bowen,* 876 F.2d 759, 761-62 & n.7 (9th Cir. 1989); *Cotton v. Bowen*, 799 F.2d 1403, 1408 (9th Cir. 1986); *Magallanes v. Bowen*, 881 F.2d 747, 751 (9th Cir. 1989).

To reject the uncontroverted opinion of a treating physician, the ALJ must present clear and convincing reasons for doing so. *Rodriquez*, 876 F. 2d at 761-762; *Magallanes*, 881 F.2d at 751. To reject the opinion of a treating physician that conflicts with an examining physician's opinion, the ALJ must give "specific legitimate reasons for doing so that are based on substantial evidence in the record." *Winans v. Bowen*, 853 F.2d 643, 647 (9th Cir. 1987).

In its post-trial brief, Respondent argued that the opinion of Claimant's treating physician, Dr. Ginandes, should be discounted because he was not knowledgeable as to Claimant's drug treatment and treatment history with other doctors. Respondent's Post-Trial Brief at 4. I agree. In order to reject Dr. Ginandes' opinion that conflicts with an examining physician's opinion, however, I must comply with the rule provided in *Winans* above. As such, I give the following specific reasons, based on substantial evidence in the record, for so doing:

1) Lack of familiarity with Claimant's drug treatment while under his care and Claimant's current drug regimen;

2) Lack of familiarity with Claimant's treatment with other doctors between the date of injury on August 28, 1997, and the date he commenced care on October 6, 2000;

3) No reference to objective standards applied for diagnosis; and

4) No expertise on fibromyalgia.

In light of Dr. Ginandes' unreliable testimony and his admitted lack of expertise on fibromyalgia, the general rule provided in the *Amos* case does not apply. Here, Dr. Ginandes was not employed to treat Claimant's fibromyalgia, and his testimony showed little knowledge of the Claimant as an individual. Moreover, Claimant's lack of psychiatric improvement, despite weekly visits with Dr. Ginandes for an extended period of time, begs the question of Dr. Ginandes' motivation to continue this treatment. *See* TR at 55-56. As such, I am not obligated to give his opinions greater weight than those of the other examining physicians. For the foregoing reasons, I reject Dr. Ginandes' opinion inasmuch as it conflicts with the opinions of Doctors Henrickson and Slomoff.

Causation

Although the parties stipulate to Claimant's first industrial injury, sustained on August 28, 1997, Claimant further contends that she developed additional injuries as a result of this injury – most notably fibromyalgia – for which she is entitled to disability benefits. Respondent argues that Claimant's subsequent development of fibromyalgia and/or a psychiatric injury is unrelated to the initial injury.

Upon proving a *prima facie* case, an injured worker is entitled to a presumption that any disability is causally related to her employment. 33 U.S.C.§ 920(a). Claimant bears the burden of proving this *prima facie* case, which requires that: 1) she suffered some harm or pain; and 2) the existence of employment conditions or the occurrence of a work-related accident which could have caused the harm or pain. *Kelaita v. Triple A Machine Shop*, 13 BRBS 326 (1981).

Once this presumption is invoked, the burden shifts to Employer to provide substantial evidence that Claimant's condition was not caused or aggravated by the employment. *Swinton v. J. Frank Kelly, Inc.,* 554 F.2d 1075, 1082, 4 BRBS 466, 475 (D.C. Cir. 1976), *cert. denied* 429 U.S. 820 (1976). "Substantial evidence" has been defined as "the kind of evidence a reasonable mind might accept as adequate to support a conclusion." *Conoco, Inc. v. Director, OWCP*, 181 F.3d 810, 33 BRBS 71, 76 (CRT) (7th Cir. 1999); *see also O'Kelley v. Dept. of the Army/NAF*, 34 BRBS 39 (2000) (explaining that an employer need not establish absolute certainty as to the lack of causation).

If Employer succeeds in showing substantial evidence that Claimant's condition was not caused by the employment, then the Section 20 presumption no longer controls and the issue of

causation must be determined in light of all the evidence collectively. *Devine v. Atlantic Container Lines, G.I.E.,* 25 BRBS 16, 20-21 (1990). At that point, the burden returns to Claimant who must prove by a preponderance of evidence that her employment caused the disability. *Holmes v. Universal Maritime Services Corp*., 29 BRBS 18, 21 n.3 (1995); *see also Director, OWCP v. Greenwich Collieries,* 114 S.Ct. 2251, 28 BRBS 43 (CRT).

Fibromyalgia

In order to prove the first prong of her *prima facie* case, Claimant must prove that she suffered some harm or pain. Here, Claimant asserts that she suffers from fibromyalgia.[6] None of the doctors who treated Claimant or who testified at the hearing were experts on this condition. Despite a lack of expertise, three physicians spoke to the issue of whether Claimant has fibromyalgia.

Dr. Ginandes testified that Claimant has fibromyalgia, yet he failed to provide a standard by which he tested for and made an objective finding in favor of diagnosing the condition. TR at 46. In Dr. Arakawa's June 16, 2000 report, he gave an impression that Claimant had "diffuse body pains most likely due to fibromyalgia . . . ." CX 7. Dr. Arakawa never conclusively determined that Claimant's symptoms were due to fibromyalgia, however. To the contrary, after Dr. Arakawa viewed the surveillance tapes, he concluded that her movements are not consistent with her complaints. CX 14. Finally, Dr. Henrickson found that Claimant does not suffer from fibromyalgia. TR at 114; RX 6 at 45, 53.[7] Notably, on May 29, 2001 and on September 18, 2003, Dr. Henrickson tested specifically for fibromyalgia by seeking either active or inactive trigger points; he was unable to find any indication of the condition. *Id.* Taken together, the evidence tips slightly against a finding of fibromyalgia – Dr. Ginandes did not support his diagnosis of the condition; Dr. Arakawa never established it conclusively and later questioned the extent of Claimant's disability; and Dr. Henrickson's tests for the condition produced negative results. Therefore, Claimant has not proven the first prong of her *prima facie* case.

Even upon giving Claimant the benefit of the doubt that she suffered harm in the form of fibromyalgia, the evidence weighs heavily against a finding that her August 28, 1997 injury caused the condition. Dr. Ginandes is the only doctor who found that the two were causally related, yet he gave no support for this finding. On the other hand, Doctors Oki, Crowley, Henrickson, and Slomoff determined that Claimant's August 28, 1997 injury resolved by September 28, 1998, and/or was unrelated to a subsequent diagnosis of somatoform pain disorder, rather than fibromyalgia. TR 108; RX 6 at 34; RX 15 at 92, 105. As such, Claimant's *prima facie* case as to fibromyalgia fails.

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[6] Claimant offered Claimant's Exhibits 9-11, 13 and 14, which were internet sources describing the condition, however the provenance of internet sources is difficult to trace and therefore cannot be lent any significant evidentiary weight.

[7] During examination on May 29, 2001, Dr. Henrickson offered the following observation: "[Claimant} appears to want the confirmation of actually having trigger points to explain her pain. There are simply none on examination today." RX 6 at 45. During a subsequent examination on September 18, 2003, Dr. Henrickson concluded, "[a] detailed examination has been performed . . . . Her essentially total-body complaints today are not consistent with any organic medical disturbance." RX 6 at 54.

Orthopedic Injuries

Here, the parties agree that Claimant suffered an injury to her back and neck resulting from an incident at work. Therefore, no *prima facie* analysis as to Claimant's back and neck injuries is required. As to her claim for carpal tunnel, however, Claimant proved she suffered a harm. On November 6, 1997, Dr. Sasaki found mild right carpal tunnel syndrome. RX 9 at 62. Two days later, Dr. Pierce diagnosed the same condition. RX 6 at 49. Finally, on July 7, 1999, Dr. Atkinson gave a clinical impression of mild carpal tunnel syndrome. RX 13 at 78. Claimant provided no evidence, however, that employment conditions or a work-related injury caused her carpal tunnel syndrome. Therefore, she failed to prove a *prima facie* case as to this specific orthopedic injury.

Psychiatric Injury

The Claimant need not prove objective symptoms of psychiatric harm in order to prove the first prong of her *prima facie* case. *See Crawford v. Director, O.W.C.P.,* 932 F.2d 152, 24 BRBS 123 (CRT) 2nd Cir. 1991; *Sylvester v. Bethlehem Steel Corp*., 14 BRBS 234, 236 (1981), *aff'd sub nom., Sylvester v. Director, O.W.C.P*., 681 F.2d 359, 14 BRBS 984 (CRT) (5th Cir. 1982). Here, Doctors Rinzler, Crowley, Ginandes, Henrickson, and Slomoff agree that Claimant presents a somatoform pain disorder. Therefore, Claimant satisfies this first prong of the analysis.

Although the afore-mentioned physicians either diagnosed or agreed with a diagnosis of a somatoform pain disorder, only Dr. Ginandes makes the direct correlation between Claimant's August 28, 1997 injury and the onset of her psychiatric injuries. Based on his testimony, however, Dr. Ginandes' conclusion is not credible because he demonstrated no familiarity with Claimant's treatment between the date of her initial injury in 1997 and the date of her first visit in 2000. In addition to Dr. Ginandes, however, Dr. Slomoff conceded that Claimant's industrial injury constituted a stressor that could have aggravated a pre-existing somatoform disorder. TR at 292, 302. Although Dr. Slomoff concluded that Claimant would have suffered the same psychiatric result regardless of the industrial injury, his concession that the industrial injury could have compounded a pre-existing psychiatric problem is enough to satisfy the second prong of the *prima facie* analysis. Therefore, Claimant is entitled to the Section 20 presumption as to her psychiatric injury.

I have weighed all of the evidence presented in light of the law set forth hereinabove, and I find that Claimant has not met her *prima facie* case as to fibromyalgia or carpal tunnel syndrome, but she has met it as to her other orthopedic injuries and psychiatric claim.

Nature and Extent of Injury

An injured worker's disability under the Act may be found to have changed from temporary to permanent if and when the employee's condition reaches the point of "maximum medical improvement" or "MMI." *James v. Pate Stevedoring Co*., 22 BRBS 271, 274 (1989); *Phillips v. Marien Concrete Structures* 21 BRBS 233, 235 (1988). Any disability before reaching MMI would be temporary in nature. *Id*. Medical evidence must establish the date at

which the employee has received the maximum benefit from medical treatment such that his condition will not further improve. *Trask v. Lockheed Shipbuilding & Constr. Co.,* 17 BRBS 56, 60 (1985). Accordingly, the determination as to when maximum medical improvement has been reached, so that a claimant's disability may be termed "permanent," is primarily a question of fact based upon medical evidence. *Lozada v. Director, O.W.C.P.,* 903 F. 2d 168, 23 BRBS 78 (CRT) (2d Cir. 1990); *Hite v. Dresser Guiberson Pumping*, 22 BRBS 87, 91 (1989); *Care v. Washington Metropolitan Area Transit Authority*, 21 BRBS 248 (1988).

Under the Act, Claimant has the initial burden of establishing the extent of her disability. *Trask v. Lockheed Shipbuilding & Constr. Co*., 17 BRBS 56, 60 (1985). Disability under the Act means "incapacity as a result of injury to earn wages which the employee was receiving at the time of the injury in the same or any other employment . . . ." 33 U.S.C. § 902 (10). In order for a claimant to receive a disability award, she must have an economic loss coupled with a physical or psychological impairment. *Sproull v. Stevedoring Servs. of Am.,* 25 BRBS 100, 100 (1991). Claimant is entitled to a presumption of total disability once she shows by a preponderance of the evidence that the work-related injury prevents her from returning to her former employment. *Mijangos v. Avondale Shipyards, Inc.,* 948 F,2d 941, 25 BRBS 78, 80 (CRT) (5th Cir. 1991).

Orthopedic Injuries

Claimant alleges cervical, upper back, and left-upper extremity injuries resulted from her August 28, 1997 injury. The physicians who treated Claimant within the first few months of her injury diagnosed a neck strain; muscle spasm in her neck; cervical and trapezius sprain; and myofascial pain syndrome.

Respondents contend that Claimant recovered from these orthopedic injuries by October 14, 1999.[8] I agree. Following Claimant's treatment with Dr. Oki, Dr. Rinzler asserted that Claimant's problems revolved around "her unwillingness to acknowledge the psychological contributions to her pain and distress." RX 12. Likewise, Dr. Crowley found no physiologic abnormalities and he opined that claimant presented a somatoform pain syndrome. RX 10, CX 3. Dr. Henrickson agreed with Dr. Crowley's diagnosis and added that the somatoform symptoms were not related to the industrial injury. TR at 110. Further, by the time of his October 14, 1999 report, Dr. Henrickson determined that the orthopedic injury had resolved. RX 6 at 35.

Although Dr. Ginandes opined that Claimant's initial injury to her neck and back caused her subsequent orthopedic maladies, he lacked command of Claimant's condition and treatment between the date of her initial injury in 1997 and her first visit with him in 2000. CX 8, TR at 49. As such, his summation of relatedness is not credible, and I find that the date of maximum

[8] Respondent also proposed that Claimant's orthopedic injuries were resolved by September 28, 1998 – the date Dr. Oki found that Claimant's condition was normal. Although Dr. Oki's reports were referenced by Drs. Henrickson and Slomoff, they are not part of the record. Dr. Henrickson's October 14, 1999 report provides the diagnosis that the "left infrascapular muscle injury, strain/tear, related to the subject injury of [August 28, 1997], resolved." As such, I determine this as the proper date of resolution.

medical improvement as to Claimant's orthopedic injuries is October 14, 1999, pursuant to Dr. Henrickson's report.

As to the impact of the injury on Claimant's ability to earn wages, the record shows that Claimant did not suffer a loss of wages because of the August 28, 1997 injury. Claimant continued to work for Respondent after her injury. In September 1998, Claimant took a new position with Respondent as an accounting assistant. Claimant's orthopedic injuries resolved by October 14, 1999. She remained in the accounting assistant position until September 2000. This position paid more than Claimant's prior food service job. RX 17 at 145. As such, this injury did not have an impact on her earning capacity, and Claimant is not entitled to a disability award based upon her orthopedic injuries.

Psychiatric Injury

Pursuant to Section 2(2) of the Act, a work-related aggravation of a pre-existing condition is an injury that may be compensated. *Gardner v. Bath Iron Works Corp.,* 11 BRBS 556 (1979), *aff'd sub nom., Gardner v. Director, OWCP*, 640 F.2d 1385 (1st Cir. 1981); *Preziosi v. Controlled Industries*, 22 BRBS 376 (1989) (decision and order on remand); *Johnson v. Ingalls Shipbuilding*, 22 BRBS 160 (1989); *Madrid v. Coast Marine Construction*, 22 BRBS 148 (1989). According to Dr. Slomoff, Claimant had an underlying somatoform disorder prior to her injury. TR at 289. Dr. Slomoff conceded that Claimant's August 28, 1997 injury was one of many stressors in Claimant's life, which could have aggravated her somatoform disorder. TR at 302. If indeed this injury had aggravated Claimant's pre-existing condition, then she would have suffered a compensable injury.

Here, Respondent succeeded in showing substantial evidence that Claimant's somatoform condition was not caused by the employment. The testimony by Dr. Slomoff provides that Claimant's underlying somatoform disorder lends to a disposition where conflict or stressors in Claimant's life give rise to a pain reaction. TR at 301-302. Dr. Slomoff summarized the various stressors that were present in Claimant's life before, during, and after the injury, which likely caused her current condition. Examples include: 1) conflicts with coworkers; 2) conflicts with her roommates and boyfriend; 3) an abusive husband and a litigious divorce; 4) anger at surveillance films; and 5) frustration with the litigation process. TR at 170-171, 196-204.

Based on the evidence as a whole, I find that the industrial injury did not cause Claimant's psychiatric problems. I agree with Dr. Slomoff that the industrial injury was transient in nature, whereby Claimant's development of subsequent maladies was not attributable to the injury itself, but to a multitude other stressors. Thus, Claimant has not shown by a preponderance of evidence that either her employment or her industrial injury caused the subsequent disability.

Respondents further contend that Claimant is capable of returning to work. Respondent argues that Claimant left her position in September 2000, because of interpersonal conflicts with co-workers, rather than an injury. TR at 171-172. Respondents rely on the surveillance videos, which show Claimant functioning at a normal, albeit sedentary level. Respondents also defer to the opinions of Drs. Arakawa, Henrickson, and Slomoff, who found that Claimant's activities on

the film are inconsistent with her complaints. Dr. Slomoff also opined, based on a psychiatric perspective, that Claimant is capable of returning to work.

Moreover, Respondents identified suitable, alternative employment for Claimant. RX 18. Under the Act, Claimant must show that she attempted to obtain employment. *See New Orleans (Gulfwide) Stevedores v. Turner,* 661 F.2d 1031, 1043, 14 BRBS 156, 165 (5th Cir.). Claimant testified, however that she has not sought any employment since September 2000. TR at 185-186. Although Claimant contends that her condition keeps her from working – an opinion substantiated by Dr. Ginandes only – the surveillance tapes and opinions of Drs. Arakawa, Henrickson, and Slomoff, provide credible evidence that Claimant can work. Based on the evidence as a whole, I find that Claimant is capable of performing her previous position as well as the positions identified by Respondent.[9]

ORDER

Based upon the foregoing Findings of Fact, Conclusions of Law and upon the entire record, I find that:

1) Claimant has not proven a prima facie case as to her claims of fibromyalgia and carpal tunnel;

2) Claimant's orthopedic injuries resolved by October 14, 1999, and these injuries did not have an impact on her earning capacity after this date; and

3) Claimant's subsequent development of a somatoform pain disorder did not result from her August 28, 1997 injury.

It is therefore **ORDERED** that Claimant's claim is hereby **DENIED.**

A

Russell D. Pulver
Administrative Law Judge

[9] Respondent employed Eileen Figueroa, a certified rehabilitation and grief counselor to determine placement possibilities for Claimant. RX 18. On January 17, 2002, Ms. Figueroa identified the following employment opportunities: 1) account clerk/bookkeeper; 2) entry level accounting clerk; 3) accounts payable clerk; 4) patient account clerk; 5) purchasing/bookkeeping assistant; 6) inventory clerk; 7) reservations clerk; 8) finance specialist II; 8) bookkeeper/office manager; 9) bookkeeper. RX 18 at 148-149.